

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Aug 20, 2012

LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	<u>O R D E R</u>
)	
ROBERTO ESPINOSA FARIAS,)	
)	
Defendant-Appellant.)	

Before: COLE, GIBBONS, and DONALD, Circuit Judge.

Defendant Roberto Farias appeals his conviction of conspiracy to distribute and to possess with intent to distribute cocaine. The government moves to dismiss the appeal based on an appellate-waiver provision in his plea agreement. Farias maintains that his Eighth Amendment challenge to the 340-month sentence is not barred by the waiver.

“Plea agreements are contractual in nature. In interpreting and enforcing them, we are to use traditional principles of contract law.” *United States v. Wells*, 211 F.3d 988, 995 (6th Cir. 2000) (quoting *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991)). Plea agreements “are to be enforced according to their terms.” *United States v. Moncivais*, 492 F.3d 652, 662 (6th Cir. 2007). An appeal waiver within a plea agreement is valid if it is made knowingly and voluntarily. *United States v. Gibney*, 519 F.3d 301, 305-06 (6th Cir. 2008); *United States v. Coker*, 514 F.3d 562, 573 (6th Cir. 2008). Thus, if the plea was voluntary and the colloquy proper under Federal Rule of Criminal Procedure 11, the waiver provision will be enforced. *See United States v. Sharp*, 442 F.3d 946, 949-52 (6th Cir. 2006).

The government argues that Farias's plea was knowing and voluntary and the sentence imposed falls within the terms of the appeal waiver. Farias does not assert that the appeal waiver was not knowing and voluntary. In his appellate brief, he mischaracterizes the waiver as excepting from its terms any unconstitutional sentence. The language of the appeal waiver is not as broad as Farias asserts. The appeal waiver permits an appeal only of a sentence above the statutory maximum or a sentence that is based on unconstitutional factors such as race, religion, or gender. Farias's Eighth Amendment challenge does not fall within the exception to the waiver, and his appeal is barred by the express terms of the plea agreement.

The government is entitled to enforcement of the valid appeal waiver, and its motion to dismiss is **GRANTED**.

ENTERED BY ORDER OF THE COURT



Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Leonard Green
Clerk

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Re: Case No. 11-2479, *USA v. Roberto Farias*
Originating Case No. : 1:08-CR-274-21

Dear Sir or Madam,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Robin Duncan
Case Manager
Direct Dial No. 513-564-7027

Enclosure

No mandate to issue